

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

NEBRASKA ACCT. & DISCLOSURE COMM. V. PROKOP

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NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION, APPELLEE,

V.

ROBERT J. PROKOP, APPELLANT.

Filed April 27, 2010. No. A-09-690.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge.
Affirmed.

Robert J. Prokop, pro se.

Jon Bruning, Attorney General, and Lynn A. Melson for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Robert J. Prokop appeals from the order of the district court for Lancaster County, which granted judgment in favor of the Nebraska Accountability and Disclosure Commission (Commission) for late fees imposed in connection with Prokop's 2006 candidacy for the University of Nebraska Board of Regents. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. For the reasons set forth herein, we affirm.

BACKGROUND

Prokop was a candidate for the Board of Regents in 2006. Under the Nebraska Political Accountability and Disclosure Act (NPADA), Neb. Rev. Stat. §§ 49-1401 to 49-14,141 (Reissue 2004 & Supp. 2005), such candidates are required to file certain statements and reports with the Commission. These statutes set forth a system by which candidates report receipts and

expenditures in connection with their campaigns. We have referred throughout this opinion to the NPADA provisions in effect at the time of Prokop's candidacy.

The 2006 primary election was held on May 9. On May 4, Prokop mailed campaign materials from the Denton, Nebraska, post office at a cost of \$2,852.15, which Prokop paid by using his personal credit card. Prokop paid the credit card bill, which included the May 4 purchase, with a check dated May 30, 2006.

On September 8, 2006, Prokop filed an application for public funds, which triggered an audit by Commission staff of Prokop's campaign finances. The Commission's staff auditor determined that the May 4 purchase of postage by Prokop was an in-kind contribution to his campaign. The staff auditor determined that the transaction caused Prokop to be subject to two reporting requirements.

The first reporting requirement was the statement of organization. Under § 49-1413, a candidate committee is formed by operation of law when a committee spends more than \$5,000 within a calendar year. The Commission staff auditor determined that the May 4, 2006, postage expenditure caused Prokop's spending to exceed the \$5,000 amount. Section 49-1449(2) requires candidate committees, which form within 30 days prior to an election, to file a statement of organization within 2 business days after the committee is formed. Prokop did not file a statement of organization until May 31. The Commission staff determined that the filing should have been made on May 8, which was 2 business days after May 4, a Thursday.

The second reporting requirement was a report of late contribution, which is required to be filed within 2 business days after a late contribution is received. § 49-1458(1). Under § 49-1458(5), a "late contribution" is defined as a contribution of \$1,000 or more received after the closing date for campaign statements as provided in § 49-1459(1)(b). Section 49-1459(1)(b) provides that the closing date for a campaign statement filed under this subdivision is the 15th day before the election. The Commission staff determined that the May 4, 2006, postage purchase was an in-kind contribution by Prokop and should have been reported by May 8. Prokop did not file a specific report for the May 4 contribution, but the Commission staff determined that Prokop's postprimary campaign statement filed June 20 could be accepted as his report of late contribution. We note that in this campaign statement, Prokop reported to the Commission that \$2,852.15 was spent on postage.

The statutes provide for late filing fees. The fee for filing a late statement of organization is \$100 for each day the statement remains not filed, not to exceed \$1,000. § 49-1449(2). The fee for filing an untimely report of late contribution at the time of Prokop's candidacy was \$100 per day, not to exceed \$3,000 or 10 percent of the late contribution required to be reported, whichever was greater. § 49-1458(4). We note that, on its face, the statement of organization completed by Prokop acknowledges the statutory filing requirements for statements of organization and the fees to be assessed for the late filing of those statements.

Frank Daley, executive director of the Commission, sent a notice to Prokop on October 23, 2006, informing him of the late filing fees which arose due to the late statement of organization and the late report of late contribution. Specifically, Daley informed Prokop of the two late fees, which totaled \$3,575, advised him that interest at a particular rate would be assessed if the fees were not paid within 30 days of the notice, and advised him that he could seek relief from the fees by making a written request to the Commission. Daley attached the

procedures for requesting relief from the Commission. Daley also sent letters to Prokop on November 15 and November 29 to further explain the late filing fees and to remind him that he could apply for relief. An additional followup letter was sent on November 1, 2007, at which time Prokop was asked to pay the late filing fees and advised that he could still request relief. The record shows that Prokop neither paid the late fees nor requested relief.

The Commission filed an action to collect the late filing fees and interest owed by Prokop, which arose under the NPADA. Prokop filed an answer and counterclaim, in which he raised a number of issues, including due process in connection with the late fees imposed by the Commission.

Following a bench trial on June 8, 2009, the district court entered judgment on June 16 in favor of the Commission for \$3,575 plus interest and costs. The court first addressed Prokop's argument that the Commission failed to prove that the entire \$2,852.15 postage purchased on May 4, 2006, was used for political purposes. The court concluded that the Commission had met its burden of proof to show that the \$2,852.15 was spent entirely for political purposes and was spent on May 4, 2006.

The district court next considered the effective date of the \$2,852.15 expenditure for accountability purposes. Prokop argued that for purposes of filing a statement of organization and report of late contribution, the time for calculation of the due date began on the day the credit card bill was paid rather than the day the credit card was used to pay for the mailing. Based on statutory definitions of what constitutes a committee expenditure, which includes the "pledge or promise of money," the court found Prokop's position to be without merit. The court reasoned that Prokop's use of a personal credit card to pay the post office for mailing campaign materials was a pledge or promise of payment of money within the statutory definition of "expenditure." § 49-1419(1). The court concluded that whether the promise was kept through payment of the credit card bill was immaterial, reasoning that it was making the promise to pay that was relevant for accountability purposes. Accordingly, the court found that May 4, 2006, and not May 30, was the relevant date for accountability purposes.

The district court next considered Prokop's assertions that the late fees were imposed by the executive director of the Commission, who does not have the authority to assess late fees, and should have been imposed through some action of the Commission. The court held that the two statutorily required filings arose by operation of law pursuant to the NPADA, that there was no action required by the Commission to either impose or calculate the late fees, and that the Commission's executive director "simply performed a ministerial act in notifying [Prokop] of the late fee obligation."

Finally, the district court considered Prokop's assertions that he was deprived of due process by not being permitted a hearing before the Commission regarding the propriety of the late fee imposed by statute. The court reviewed the statutory requirements under § 49-1463.01 for seeking relief from the Commission for late filing fees and noted that although Prokop was advised of his right to seek relief on a number of occasions, he did not do so. After a complete and thorough analysis of the issue, the court held that the process provided by § 49-1463.01 was sufficient under the due process clause. Prokop subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Prokop asserts, restated, that the district court erred in (1) failing to find a violation of his due process rights, (2) failing to require the Commission to produce a certain witness, (3) allowing the testimony of certain other witnesses, (4) denying testimony about certain rules and regulations, (5) failing to allow a 2-day trial, and (6) failing to find that the Commission improperly delegated certain duties to its executive director.

STANDARD OF REVIEW

The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Conley v. Brazier*, 278 Neb. 508, 772 N.W.2d 545 (2009).

When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Erickson v. U-Haul Intern.*, 278 Neb. 18, 767 N.W.2d 765 (2009).

A trial judge has broad discretion over the conduct of a trial, and, absent abuse, that discretion should be respected. *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

ANALYSIS

Due Process.

Prokop asserts that the district court erred in failing to find a violation of his due process rights. Prokop argues that he was deprived of due process by not being permitted a hearing before the Commission regarding the propriety of the late fees.

As noted above, the NPADA includes provisions for fees for the late or untimely filing of statements of organization and reports of late contribution. See §§ 49-1449(2) and 49-1458(4). These provisions are self-executing, and the imposition of late fees under these sections occurs by operation of law with no provision for a hearing before the Commission. However, under § 49-1463.01, a person required to pay a late filing fee imposed under the NPADA may apply to the Commission for relief. The Commission may “reduce the amount of a late filing fee imposed and waive any or all of the interest due on the fee” upon a showing that

(a) the circumstances indicate no intent to file late, (b) the person has not been required to pay late filing fees for two years prior to the time the filing was due, (c) the late filing shows that less than five thousand dollars was raised, received, or expended during the reporting period, and (d) a reduction of the late fees and waiver of interest would not frustrate the purposes of the [NPADA].

§ 49-1463.01(1). The record in this case shows that on four different occasions over about a 1-year period following the notice of late fee, Prokop was advised of his right to seek relief from the late fee assessment and that he did not do so. The district court determined that because the Commission’s rules and regulations were not submitted into evidence and because Prokop did not seek relief from the late fee assessment, his due process claim was limited to consideration of whether the statutory scheme provided an opportunity for due process. The Commission does not question that Prokop was entitled to due process in connection with the imposition of late fees,

so we turn our consideration to what process was due to Prokop and whether the district court erred in its analysis of this issue.

In considering due process issues in connection with the administrative revocation of drivers' licenses, the Nebraska Supreme Court has stated:

Once it is determined that due process applies, the question remains what process is due. . . . Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. . . . Thus, before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.

Chase v. Neth, 269 Neb. 882, 893, 697 N.W.2d 675, 685 (2005) (citations omitted). In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.* In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the U.S. Supreme Court determined that a number of factors are to be considered in resolving an inquiry into the specific dictates of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). The concept of due process embodies the notion of fundamental fairness and defies precise definition. *Id.* Due process is a flexible notion that must be decided on the facts presented in a particular case and calls for such procedural protections as the particular situation demands. *Id.*

The district court reviewed Prokop's due process claim utilizing the principles set forth above. Because of the thoroughness of that review, we have set it forth in its entirety:

Using the dictates of *Marshall*, the court finds that the process provided by statute in § 49-1463.01 is sufficient under the Due Process Clause. The private interest involved in this case is money. The imposition of late fees does not subject [Prokop] to the possibility of a loss of freedom or a threat to his personal integrity which may linger.

The risk of an erroneous deprivation or erroneous obligation to pay a late fee through the procedures used is relatively small. The assessment of the late fee is based on information provided to the Commission through filings made by [Prokop] himself. There is no extrapolation or judgment required of the Commission or its executive director. In this case, there is a paper trail which identifies when the credit card was used to purchase the mailing from the United States Post Office. Other expenditures of [Prokop] which pre-dated the mailing were not at issue as to amount or date. The risk of an erroneous assessment is quite low.

The probable value, if any, of additional or substitute procedural safeguards seems remote in this case. [Prokop] argues that the review by the Commission does not

allow it to consider whether a late fee should have been assessed in the first instance. The procedures presume that it should have. The only review [Prokop] can secure is whether there should be some relief. [Prokop] is correct. However, as has been shown by the existence of this case, [Prokop] is able to raise the propriety of the late fee in defense of the court action by the Commission to collect the late fees.

The Legislature has determined that there is a significant governmental interest in securing timely disclosure of financial information regarding the conduct of election campaigns. The imposition of a late fee for failing to timely file is an encouragement for all candidates to timely comply with disclosure requirements. It does not appear that additional or substitute procedural requirements would be either fiscally or administratively advantageous for the candidate, the Commission, or the public.

The court finds that there is no Due Process violation in the process which has been provided [Prokop].

In addition to the district court's analysis of this issue, with which we agree, we note two things. First, Prokop has not assigned error to the court's determinations that the \$2,852.15 postage purchase was made on May 4, 2006, was used for campaign purposes, and constituted an in-kind contribution and expenditure on that date as opposed to the date on which Prokop paid his credit card bill. Second, the record shows that had Prokop requested relief from the late fees imposed in this case, he would have had the opportunity to request either a formal or an informal hearing before the full Commission. Daley testified that when a request for relief is received by the Commission, the executive director has been delegated the authority to initially grant or deny relief based on the statutory criteria. If a candidate is unhappy with this initial decision, the candidate then has the opportunity to request either a formal or an informal hearing before the full Commission, at which the candidate could raise issues such as whether the candidate qualified for relief or whether the late fees were properly assessable. In Daley's experience, candidates have requested both informal and formal hearings and in some cases, the Commission has granted relief. Although Prokop was informed of the procedure for contesting late fees and provided with a form to do so, he did not take advantage of the opportunity to do so.

We find no error in the district court's determination that Prokop was provided with sufficient due process.

Failure to Produce Witness.

Prokop asserts that the district court erred in failing to require the Commission to produce a certain witness. Although Prokop's arguments concerning this assignment of error are not entirely clear, he appears to be addressing the court's failure to admit a particular deposition into evidence.

The record shows that a pretrial conference was held on March 2, 2009. During the conference, Prokop indicated his intent to call Kimberly Quandt, the chairman of the 2006 Commission, as a witness at trial, arguing that her deposition testimony was "not favorable" to the Commission. Quandt was one of 12 potential trial witnesses listed by Prokop, but she was not listed as a potential witness by the Commission.

At trial, on June 8, 2009, the Commission put on its case and rested before the noon recess. After the recess, Prokop then offered Quandt's deposition because she was "not

available.” The Commission objected to Prokop’s offer of the deposition, arguing that Quandt was in fact available and should have been subpoenaed 6 days in advance of her testimony in accordance with statute. In response to the Commission’s objection to his offer of the deposition, Prokop explained that he had a subpoena issued for Quandt on Friday, June 5, and delivered it to the county sheriff. Prokop explained further that the sheriff was unable to serve the subpoena because Quandt was out of the area on vacation. The district court sustained the Commission’s objection to the offer of Quandt’s deposition on the basis of the late issue date of the subpoena.

In his arguments on appeal, Prokop appears to blame the Commission for his inability to secure Quandt’s attendance at trial. The burden to establish a declarant’s unavailability is on the party seeking to introduce the evidence under Neb. Rev. Stat. § 27-804 (Reissue 2008), and the determination of whether a witness is unavailable to appear at trial and give testimony is within the discretion of the trial court. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010).

Prokop failed to subpoena his witness in a timely fashion, and we find no abuse of discretion in the court’s failure to admit Quandt’s deposition into evidence under the hearsay exception allowing for deposition testimony of unavailable witnesses. Prokop’s assignment of error is without merit.

Witness Testimony.

Prokop asserts that the district court erred in allowing the testimony of certain witnesses. Prokop’s argument in connection with this assignment of error is as follows:

[T]he presiding Judge forced [Prokop] to place witnesses on the stand who were subpoenaed at the same time [Quandt] was subpoenaed. The witnesses were members of the . . . Commission staff, Executive Director and auditors. If due process speaks of fairness, then due process was most certainly violated by this decision. [Prokop] was turned down for a second day of trial previously agreed to and force[d] to proceed. The Court had set a two day trial in the [Pretrial] Conference.

Brief for appellant at 24 (citations omitted).

Prokop’s argument apparently refers to the fact that he had subpoenaed his witnesses, other than Quandt, to appear at 9 a.m. on the day following the day when the Commission rested its case. Prokop’s argument does nothing, however, to explain how his due process rights were violated or how the district court abused its discretion by allowing him to present testimony from himself and his witnesses, other than Quandt, following the lunch break on the first and only day of trial. The record shows that Prokop presented testimony from four witnesses, other than himself, and thoroughly questioned each of those witnesses. Prokop’s assignment of error is without merit.

Testimony About Rules and Regulations.

Prokop asserts that the district court erred in denying testimony about certain rules and regulations. Specifically, Prokop argues that the court should have allowed Quandt to testify as to rules and regulations of the Commission and thus “set form and foundation for those items.” Brief for appellant at 10. We have addressed Prokop’s arguments about Quandt above and found

them to be without merit. Prokop asserts that the court “sustained a motion of relevancy” to the Commission’s rules and regulations, but a review of the record does not reveal any such “motion” or objection. Brief for appellant at 24. Prokop did not offer any rules and regulations into evidence, and he does not explain why foundation for the admission of such rules and regulations could not have been laid through the testimony of another witness, such as Daley, who was present at trial. Nor did Prokop attempt to have the court take judicial notice of any of the Commission’s rules and regulations under Neb. Rev. Stat. § 84-906.05 (Reissue 2008). Prokop’s assignment of error is without merit.

Length of Trial.

Prokop asserts that the district court erred in failing to allow a 2-day trial. A pretrial conference was held on March 2, 2009. During the conference, the trial judge inquired whether the trial might be completed in “a couple of days . . . maximum” or “[p]erhaps even one day.” The Commission’s attorney agreed with the court’s assessment of the possible time required for trial, and Prokop agreed that the trial “could take one day.” Accordingly, the court agreed to reserve 2 days on the court’s calendar for the trial. Prokop appears to claim that he was ill prepared to proceed after the Commission rested prior to the lunch break on the first scheduled day of trial, but as discussed above, other than Quandt, his witnesses were available to testify that afternoon. Prokop conducted thorough examinations of these witnesses and presented his own testimony as well. Prokop did not seek a continuance in order to prepare further for the presentation of his case. The record does not show, and Prokop’s arguments do not reveal, that he was unduly prejudiced in the presentation of his evidence. Prokop’s arguments concern the trial judge’s conduct of the trial. A trial judge has broad discretion over the conduct of a trial, and, absent abuse, that discretion should be respected. *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009). We find no abuse in the court’s discretion in connection with the length of the trial. Prokop’s assignment of error is without merit.

Delegation of Commission Duties.

Prokop asserts that the Commission erred in failing to find that the Commission improperly delegated certain duties to its executive director. Prokop’s arguments in connection with this assignment of error are less than clear, and he appears to address many issues not raised in his assignments of error. For an appellate court to consider an alleged error, the error must be both specifically assigned and specifically argued in the brief of the party assigning the error. *Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 278 Neb. 289, 770 N.W.2d 619 (2009). To the extent that Prokop’s arguments concern his alleged inability to have a hearing before the Commission, we have addressed that issue in the due process section above. Prokop does not specify which duties were allegedly improperly delegated to Daley, and we note that the Nebraska Legislature has authorized the Commission to employ an executive director and delegate duties to him. Section 49-14,121 provides in relevant part:

The commission shall employ an executive director and may employ a general counsel and such other staff as are necessary to carry out its duties pursuant to the [NPADA]. The executive director shall serve at the pleasure of the commission and shall be solely responsible to it. The executive director shall be responsible for the administrative operations of the commission and shall perform such other duties as may

be delegated or assigned to him or her by the commission, except that the commission shall not delegate the making of regulations to the executive director.

There is nothing in the record to suggest that the Commission delegated the responsibility for making rules and regulations to Daley. Daley specifically testified that the Commission did not delegate to him the responsibility for making rules and regulations. To the extent that Prokop is arguing, as he did at trial, that the imposition of late fees requires some action by the Commission, we find no merit to this argument. The district court reviewed the relevant statutes involved in this case and determined that there was no action required by the Commission to either impose or calculate the late fees at issue. More specifically, the court determined that the late fees arose by operation of law and that the director simply performed a ministerial act in notifying Prokop of his late fee obligation. Our independent assessment of the statutes involved does not reveal any error in the court's determination in this regard. Prokop's assignment of error is without merit.

CONCLUSION

Having found Prokop's assignments of error to be without merit, we affirm the district court's entry of judgment in favor of the Commission.

AFFIRMED.